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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-775

PAUL WARREN BATES,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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IN THE
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No.

PAUL WARREN BATES,
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TO THE COURT OF CRIMINAL APPEALS
OF ALABAMA

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

By this Petition, Paul Warren Bates, respectfully seeks a writ of certiorari to review the judgment and opinions in this case of the Court of Criminal Appeals of Alabama at Montgomery, Alabama.

I. OPINIONS OF THE COURTS BELOW.

The trial court, the Circuit Court of Madison County, Alabama, did not render an opinion. A copy of the judgment and opinion of the Court of Criminal Appeals of Alabama upon original submission is appended here-

to as Appendix "A", and a copy of its order, without opinion, denying the application for rehearing is appended hereto as Appendix "B". The order of the Supreme Court of Alabama denying, without opinion, the petition for writ of certiorari to the Court of Criminal Appeals of Alabama is appended hereto as Appendix "C". The judgment and opinion of the Court of Criminal Appeals of Alabama upon original submission, as well as its subsequent order denying application for rehearing, is published and reported in 266 So. 2d 155. The denial of the petition for writ of certiorari by the Supreme Court of Alabama, without opinion, is published and reported in 266 So. 2d 160.

II. JURISDICTIONAL STATEMENT.

The Court of Criminal Appeals of Alabama rendered its original judgment and opinion on June 30, 1972. It denied the application for rehearing on August 1, 1972. The Supreme Court of Alabama denied the petition for writ of certiorari to the Court of Criminal Appeals of Alabama on August 31, 1972. The original judgment and opinion of the Court of Criminal Appeals of Alabama rendered on June 30, 1972, thereby became a final judgment which the highest court of the State of Alabama refused to disturb.

The statutory provision believed to confer jurisdiction on this Honorable Court to review the final judgment rendered on June 30, 1972, by the Court of Criminal Appeals of Alabama is 28 U.S.C. Section 1257(3). In the courts below, Petitioner specially set up and claimed rights, privileges and immunities guaranteed to him under the Fourth Amendment to the Constitution of the United States of America.

III. QUESTION PRESENTED FOR REVIEW.

Whether under the surrounding facts the search of the Petitioner and the seizure of the pistol from his person by the police officer and its subsequent introduction into evidence violated the right of Petitioner to be secure against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution made applicable to the States through the due process clause of the Fourteenth Amendment.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

The Constitutional provision involved in this case is the Fourth Amendment to the Constitution of the United States, reading:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The State statute under which Petitioner was convicted is Title 14, Section 174(a), Code of Alabama, 1940, recompiled 1958, reading:

> No person who has been convicted in this state or elsewhere of committing or attempt-

ing to commit a crime of violence shall own a pistol or have one in his possession or under his control.

Title 14, Section 172, Code of Alabama, 1940, recompiled 1958, states that the crimes of burglary and larceny are included as "crimes of violence."

Act No. 157, Acts of Alabama, Special Session, 1966; Title 15, Section 118(1) and 118(2), Code, 1940, recompiled 1958, sometimes referred to as the "stop and frisk" law, is as follows:

Section 1. A sheriff, or other officer acting as sheriff, or his deputy, or any constable, acting within their respective counties, or any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county or any highway patrolman or state trooper may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or other public offense, and may demand of him his name, address and an explanation of his actions.

Section 2. When a sheriff, or other officer acting as sheriff, or his deputy, or any constable, acting within their respective counties, or any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county, or any highway patrolman or state trooper has stopped a person for

questioning pursuant to this chapter and reasonably suspects that he is in danger of life or limbs, he may search such person for a dangerous weapon. If such officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

V. STATEMENT OF THE CASE.

This case arose out of the arrest and subsequent indictment of Paul Warren Bates on a charge of possession of a pistol after having been convicted of a crime of violence. The Petitioner entered a plea of not guilty and the case was tried before a jury who found the Petitioner guilty on March 19, 1969. The Petitioner was sentenced to be imprisoned in the State Penitentiary for a period of three years as punishment.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered June 30, 1972. Petitioner filed an application for rehearing which was denied, without opinion, by the Court of Criminal Appeals of Alabama on August 1, 1972. Petitioner then filed a petition for writ of certiorari which was denied, without opinion, by the Supreme Court of Alabama on August 31, 1972.

The facts surrounding Petitioner's search and seizure and subsequent arrest are as follows: Paul Warren Bates was arrested by Huntsville Police Officer

Randall Tishner on the 5th day of December, 1968, and subsequently indicted on a charge of possession of a pistol after having been convicted of a crime of violence (second degree burglary and grand larceny). The police officer was patrolling in a patrol car. (TR 5) The police officer testified that he received a call that Paul Bates had a gun at the Bella Vista Club. (TR 8) The record is silent as to whether the call came during the day or night, as to what time elapsed between the call and the subsequent search and arrest, and from whom the call came. The officer testified that in his discussions with police officials he had learned that in the process of a burglary at a grocery store in Huntsville, that Paul Bates was involved in a police officer being shot at. (TR 11-12) Officer Tishner then proceeded to the Bella Vista Club. (TR5) When the officer arrived he saw Paul Bates standing outside. (TR 11) This was the only conduct of the Petitioner observed by the officer. He asked the Petitioner if he was Paul Bates and the Petitioner said that he was. (TR 11-12) The Petitioner was then told by the officer to go over to the Club and place his hands against the wall. (TR 12) The officer patted the Petitioner's clothing and found a fully loaded .38 caliber Smith and Wesson pistol. (TR 12) The pistol was found in the right front pocket of his pants. (TR 9) The record is silent as to the charge for which the Petitioner was arrested at the club. (TR 16) The .38 caliber Smith and Wesson pistol and the bullets contained therein were admitted into evidence as State's Exhibit 1 against the Petitioner. (TR 14) There was no warrant for the search and seizure of the pistol or the arrest of the Petitioner.

The Petitioner first raised the federal question sought to be reviewed in the trial court by objecting to the hearsay testimony by the officer that " I received a call that Paul Bates had a gun." (TR 8). Petitioner then objected to the hearsay testimony of the officer that "I had learned that in the process of burglary in a grocery store in Huntsville that he was involved in a police officer being shot at, he was involved in the incident." (TR 8) Petitioner objected to the admission of the fruits of an illegal search and seizure when the pistol was introduced into evidence. (TR 9) Petitioner objected to the illegal search and seizure when the officer described how the Petitioner was searched and what was found. (TR 9) Petitioner objected again to the admission of the fruits of an illegal search and seizure when the officer testified "I found a fully loaded .38 caliber Smith and Wesson pistol." (TR 12) Petitioner objected to the illegal search and seizure when the officer was allowed to answer in the affirmative the following question: "If you will please examine this pistol. Can you tell me whether or not this is the pistol that you found on this subject?" (TR 13) All of the foregoing objections were overruled by the trial court.

The question of the illegal search and seizure was raised in the trial court at the conclusion of the State's case by Petitioner's motion to exclude the State's evidence, which motion was overruled. (TR 23-24) The Petitioner raised the question of the illegal search and seizure by his request for the general affirmative charge in his favor at the conclusion of the trial and the trial judge refused the charge. (TR 84) Petitioner raised the question of the illegal search and seizure

in his motion for a new trial made to the trial judge who denied the motion. (TR 90)

The Petitioner first raised the federal question sought to be reviewed in the Court of Criminal Appeals of Alabama by Assignments of Error Nos. 8, 9, 11, 12 and 14, which were ignored by the appellate court. The Petitioner first raised the federal question sought to be reviewed in the Supreme Court of Alabama, which is the highest court in the State, by filing his petition for writ of certiorari, which was subsequently denied.

VI. REASONS FOR GRANTING THE WRIT.

The Court of Criminal Appeals of Alabama, backed up by the Supreme Court of Alabama's denial of certiorari, has decided a federal constitutional question of substance involving Fourth Amendment rights in a way probably not in accord with applicable decisions of this Honorable Court.

Since this Honorable Court decided *Adams vs. Williams* on June 12, 1972, appearing at 405 U.S.____, 92 S. Ct. 1921, 32 L.Ed.2d 612, involving a somewhat similar search as the instant case, State Courts in Alabama have been signaled to grant policemen *carte blanche* authority to "stop and frisk" at will. Further guidance and clarification are needed.

VII. ARGUMENT.

The Petitioner respectfully requests that this Honorable Court grant certiorari to review the action of the Court of Criminal Appeals of Alabama in upholding the

denial by the trial court of rights guaranteed to the Petitioner by the Constitution of the United States regarding the search and seizure from him of a pistol which served as the basis for his conviction on a charge of possessing a pistol after having been convicted of a crime of violence. The lower appellate court's decision also has the effect of declaring constitutional Alabama's so-called "Stop and Frisk" Law, Act No. 157, Acts of Alabama, Special Session, 1966; Title 15, Section 118(1) and 118(2), Code of Alabama, 1940, recompiled 1958.

Rights against unreasonable searches and seizures granted by the Fourth Amendment to the United States Constitution have been made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp vs. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d. 1081.

The appellate courts must jealously guard individual liberties in allowing warrantless searches and seizures. Each individual case in which a warrantless search is involved can only be decided in its factual context. The Court of Criminal Appeals of Alabama in its opinion in the instant case cites *Adams vs. Williams*, 405 U.S.____, 92 S.Ct. 1921, 32 L.Ed.2d 612, June 12, 1972, as laying down the new guidelines for warrantless searches and seizures. The Alabama Court states, "Thus, we perceive no substantial difference between the facts in *Adams*, supra, and those in the present case." Let us lay the instant case alongside *Adams* and see if we can perceive any substantial similarities. The lower courts' rendition of the facts in the *Adams* case will be

used for this purpose. The evidence in *Adams* shows that Police Sergeant Connolly was alone early in the morning on patrol in a high crime area of Bridgeport at approximately 2:15 A.M. when a person known to him approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. In the instant case Officer Tishner was not alone, since he had Officer Davis with him. (TR 5) Our record is silent as to the time of the day or night Officer Tishner was on patrol and as to whether it was a high crime area of Huntsville. Sergeant Connolly was approached by a known informer at the scene of the arrest and was told that Williams was carrying narcotics and had a gun. Whereas, Officer Tishner said that he received a call that Paul Bates had a gun at the Bella Vista Club. How, where, when and from whom the "call" came is not shown in the record. There is no evidence in the record that the Petitioner was suspected of committing any crime. There is no evidence in the record to show that Officer Tishner knew that Paul Bates had been convicted of a crime of violence. Whatever led Officer Tishner to believe that Petitioner might have a weapon of some kind concealed on him was learned in his previous discussions with police officials and in the course of his duties, and was not gleaned from the "call." (TR 8). The Petitioner was merely standing outside the club when Officer Tishner arrived, so that the Petitioner rolled down no car window and Officer Tishner reached through no car window to remove any revolver from Petitioner's waistband as in *Adams* case. The Petition-

er's clothing was patted down by the officer; one may be sure that the revolver was jerked quickly from the waistband of Williams by Sergeant Connolly. Officer Tishner does not tell us in his testimony what he arrested the Petitioner for. This was not a frisk for dangerous weapons incident to a lawful arrest. The search preceded the arrest and its fruits served as the basis for the arrest. The Petitioner was not asked if he had a permit for the gun and there is nothing in the record to indicate that the officer knew that Bates had ever been convicted of a crime of violence.

To support a reasonable investigatory stop, the informant must have been known to the officer personally and must have provided him with information in the past carrying indicia of reliability to justify the officer's forcible stop. *Adams*, supra. The instant case did not involve one of those situations in which the victim of a street crime sought immediate police aid and gave a description of his assailant; neither was the instant case a situation in which a credible informant warned of a specific impending crime. The instant case was not a situation in which the subtleties of the hearsay rule should not thwart an appropriate police response.

As the Court of Criminal Appeals of Alabama states in its opinion, it is true that this Honorable Court did not use the word "reliable" in the *Adams* case in characterizing the information that the informant had pre-

viously supplied Sergeant Connolly. This Honorable Court said, "The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip." The key words in the *Adams* opinion were "indicia of reliability." The information gotten from the "call" received by Officer Tishner certainly did not carry enough indicia of reliability to justify the officer's forcible stop of Petitioner. For aught that appears from the record, the "call" was anonymous. It has been held that an officer may act on the basis of reliable information short of probable cause to make a stop, and ultimately a frisk, if necessary, but in the instant case Officer Tishner may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of Petitioner's liberty. *Terry vs. Ohio*, 392 U.S. 1, 88 S.Ct. 1868. It would have been better police work for Officer Tishner to have extended his investigation and obtained a warrant before his search. He was not and no one else was in any personal danger and no crime was being committed in his presence. At the trial the State should have introduced testimony to give the "call" some indicia of reliability.

The Court of Criminal Appeals of Alabama incorrectly construed the search and seizure provisions of the Fourth Amendment to the Constitution of the United States. The lower appellate court erred in its opinion in concluding that the police officer's patting down the Petitioner and removing from nim the pistol in question was reasonable police conduct within the mean-

ing of the Fourth Amendment. The Court of Criminal Appeals of Alabama also erred in its opinion in holding that the police officer's patting down the Petitioner and removing from him the pistol in question had the sanction of State Law by virtue of Act No. 157, Acs of Alabama, Special Session, 1966; Title 15, Section 118(1) and 118(2), Code of Alabama, 1940, recompiled 1958. The effect of this opinion was to declare the Alabama "stop and frisk" law constitutional and was incorrectly decided as a case of first impression in the appellate court of Alabama. As stated in the Alabama Court's opinion, the pertinent provisions of the Alabama "stop and frisk" law are identical to those of New York. The United States Supreme Court in *Sibron vs. New York*, 392 U.S. 40, 88 S.Ct. 1889, said that it is unnecessary to inquire into the constitutionality of the "stop and frisk" law. The question upon review of a state approved search and seizure is not whether the search or seizure was authorized by state law. The question is rather whether the search or seizure was reasonable under the Fourth Amendment to the United States Constitution. *Cooper vs. California*, 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967). This Honorable Court refused to be drawn into a decision on the facial constitutionality of the "stop and frisk" provision. On the other hand the Court of Criminal Appeals of Alabama went so far as to cite the Alabama "stop and frisk" law as giving sanction to the search, seizure of the pistol and the arrest of the Petitioner in the instant case.

CONCLUSION.

For the reasons stated, this Petition for writ of certiorari to the Court of Criminal Appeals of Alabama should be granted.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing petition for writ of certiorari has been served upon opposing counsel by placing the same in the United States mail with adequate postage affixed thereto addressed to Honorable William Baxley, Attorney General for the State of Alabama, 250 Administrative Building, Montgomery, Alabama, this 24th day of November, 1972.

Charles Curtis King

Of Counsel

APPENDIX "A"

THE STATE OF ALABAMA —
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1971-72

8 Div. 27

Paul Warren Bates

versus

State

Appeal from Madison Circuit Court

ALMON, JUDGE

Paul Warren Bates was convicted of possessing a pistol after having been convicted of a crime of violence. Tit. 14, § 174, Code of Alabama, 1940, recompiled 1958. His punishment was fixed at three years in the penitentiary.

It was stipulated that Bates had been convicted of second degree burglary and grand larceny on May 2, 1960. These are crimes of violence within the meaning of Tit. 14, § 174, Code, supra. See Tit. 14, § 172, Code, supra.

I.

Randall Tishner, the arresting officer, testified that on the night of December 5, 1968, while patrolling in a police car he was dispatched to the Bella Vista Club in Huntsville. When he arrived a man was standing in the parking lot. Officer Tishner asked the man if he was Paul Warren Bates and when the man replied in the affirmative the officer conducted a search by patting down the outside of Bates' clothing. Defense counsel objected to any testimony concerning the fruits of the search. Out of the presence of the jury the State made a showing by Officer Tishner that he received a call that Bates had a pistol and was at the Bella Vista Club. He further testified that he did not know Bates personally but did have knowledge that he had been involved in a burglary during which a police officer was shot at. Regarding the manner in which the search was made Officer Tishner further testified that after Bates identified himself he had him put his hands against the outside wall of the club, patted the outside of his clothing and found a pistol in his right front pant's pocket. Officer Tishner took the pistol from him and placed him under arrest.

This testimony was repeated in the presence of the jury and the pistol was introduced in evidence over the defendant's objection.

We are called upon to decide whether the seizure of the pistol from the defendant's person and its subsequent introduction into evidence was contrary to the proscription of the Fourth Amendment to the United States Constitution made applicable to the

States through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L. Ed. 2d 1081.

The police conduct here in question has the sanction of state law by virtue of Act No. 157, Acts of Alabama, Special Session, 1966; Tit. 15, § 118(1) and 118(2), Code, supra. This Act, sometimes referred to as the "stop and frisk" law, is as follows:

> "Section 1. A sheriff, or other officer acting as sheriff, or his deputy, or any constable, acting within their respective counties, or any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county or any highway patrolman or state trooper may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or other public offense, and may demand of him his name, address and an explanation of his actions.
>
> "Section 2. When a sheriff, or other officer acting as sheriff, or his deputy, or any constable, acting within their respective counties, or any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county, or any highway patrolman or state trooper has stopped a person for questioning pursuant to this Act and reasonably suspects that he is in danger of life or limbs, he may search such person for a dangerous

weapon. If such officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The pertinent provisions of § 118 are identical to those in New York's "stop and frisk" law. N. Y. Code, Criminal Procedure, § 180-a. In *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, the United States Supreme Court made the following observation concerning § 180-a of the New York Code:

"The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of § 180-a 'on its face.' We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. . . .

"Section 180-a, unlike § 813-a, deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to 'stop' people, 'demand' explanations of them and 'search [them] for dangerous weapon[s]' in certain circumstances upon 'reasonable suspicion' that they

represent a danger to the policeman. The operative categories of § 180-a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations. New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, see Ker v. State of California, 374 U. S. 23, 34, 83 S. Ct. 1623, 1630, 10 L.Ed.2d 726 (1963), and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search and seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.' Cooper v. State of California, 386 U. S. 58, 61, 87 S. Ct. 788, 790, 17 L. Ed. 2d 730 (1967).

"Accordingly, we make no pronouncement on the facial constitutionality of § 180-a. . . ."

The United States Supreme Court for the first time in *Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868, and its companion cases, *Sibron v. New York* and *Peters v. New York*, 392 U. S. 40, 88 S. Ct. 1889, recognized the con-

cept of "stop and frisk" and held that police officers may, under appropriate circumstances, detain and search a person suspected of criminal activity even though there is less than probable cause for arrest.

Recently in *Adams v. Williams*, ____ U. S. ____, June 12, 1972, the Court held a policeman in making an investigatory stop based on an informer's tip, may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. The evidence in that case showed that a police sergeant was alone early in the morning on patrol duty in a high crime area of Bridgeport, Connecticut at approximately 2:15 A. M. when a person known to him approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The policeman approached the vehicle to investigate the informant's report, tapped on the car window and asked the occupant to open the door. When the occupant rolled down the window instead of opening the door the policeman reached into the car and removed a fully loaded revolver from the occupant's waistband. The gun had not been visible to the policeman from outside the car but was precisely in the place indicated by the informant. The occupant of the car was then arrested by the policeman for unlawful possession of the pistol. A search incident to the arrest was conducted following the arrival of other officers and disclosed substantial quantities of heroin on the occupant's person and in the car as well as a machete and a second revolver hidden in the automobile.

In rejecting the respondent's contention that the rationale of *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 509, 12 L. Ed. 2d 723, was applicable to the informant's tip, the Court stated:

> "In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. (But in some situations — for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not thwart an appropriate police response.")

The Court further stated that "the informant was known to him personally and had provided him with information in the past." It is noteworthy that the Court did not use the word, "reliable," in characterizing the information that the informant had previously supplied this police officer. For a better understanding of the reliability of the informant we quote from the dissenting opinion of Mr. Justice Marshall:

"The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station. The following colloquy took place between respondent's counsel and the officer at the hearing on respondent's motion to suppress the evidence that had been seized from him.

"Q. Now, with respect to the information that was given you about homosexuals in the Bridgeport Police Station [sic], did that lead to an arrest? A. No.

"Q. An arrest was made. A. No. There was no substantiating evidence.

"Q. There was no substantiating evidence? A. No.

"Q. And what do you mean by that? A. I didn't have occasion to witness these individuals committing any crime of any nature.

"Q. In other words, after this person gave you the information, you checked for corroboration before you made an arrest. Is that right? A. Well, I checked to determine the possibility of homosexual activity.

"Q. And since an arrest was made, I take it you didn't find any substantiating information. A. I'm sorry, counselor, you say since an arrest was made.

"Q. Was not made. Since an arrest was not made, I presume you didn't find any substantiating information. A. No.

"Q. So that, you don't recall any other specific information given you about the commission of crimes by this informant? A. No.

"Q. And you still thought this person was reliable. A. Yes."

Thus, we perceive no substantial difference between the facts in *Adams*, supra, and those in the present case. In this case Officer Tishner received a radio dispatch that the defendant was at a certain place armed with a pistol. Police officers had been shot at during the commission of a burglary in which the defendant was involved. With this knowledge it would certainly have been poor police work for Officer Tishner to have ignored this dispatch. When he arrived at the Bella Vista Club he found the defendant present which tended to corroborate the information he had received. Considering what Officer Tishner knew, he had reason to believe that the defendant was armed and very possibly dangerous. We conclude that his patting down the defendant and removing from him the pistol in question was reasonable police conduct within the meaning of the Fourth Amendment.

This case seems to us part of that "protean variety of the street encounter," for which a "narrowly drawn authority" to engage in a limited search for weapons exists when a police officer, on the basis of "specific reasonable inferences which he is entitled to draw from the facts in light of his experience" has "reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*, supra.

This case, unlike *Terry*, did not involve "unusual conduct" observed on the street by an officer. But we are of the opinion that this radio dispatch, even con-

ceding that it was predicated upon an unidentified informant, in light of the visual corroboration and the knowledge Officer Tishner possessed, justified the patting down of the defendant. For cases upholding searches similar to this based upon anonymous tips coupled with visual corroboration see *People v. Taggart*, 20 N. Y. 2d 335, 229 N. E. 2d 581; and *Ballou v. Massachusetts*, 403 F. 2d 982.

II.

It is further argued in brief that if a defendant, at the time of possessing a concealed weapon had good reason to apprehend an attack on his person, then the jury may consider such fact, if shown by the evidence, either in justification of the offense or in mitigation of the punishment, as the jury may determine. This argument is untenable for two reasons. First, the court fixes the punishment when a conviction like the one in the present case is under Tit. 14, § 174, Code, supra; and, secondly, the provisions of Tit. 14, § 162 apply solely to a charge for carrying a concealed weapon under Tit. 14, § 161. *Hodges v. State*, 45 Ala. App. 29, 221 So. 2d 922, cert. denied 284 Ala. 731, 221 So. 2d 923.

Finding no reversible error, the judgment appealed from is due to be affirmed.

AFFIRMED.

Cates, P. J., Tyson and Harris, JJ., concur.

CATES, P. J., concurring:

Terry, *Sibron* and *Peters*, (op. cit. in Judge Almon's opinion) lay down the Federal Fourteenth Amendment Standards for state adjudication.

As to Alabama's standards I would ignore Michie's 1958 unofficial code and instead go to the original source Act No. 157, approved August 19, 1966 (Acts 1966 Special Session, p. 183).

There we find that the title of the Act limits the substance to a peace officer's (1) temporary questioning of persons in public places and (2) a search for weapons. This limitation narrows the breadth of the wording of the Act to what is reasonably germane to these two acts, i. e., questioning and searching for weapons, § 45 Cons., 1901. *Kendrick v. Boyd*, 255 Ala. 53, 51 So. 2d 694.

Thus when we collate the Federal limitations with the Alabama Act as controlled by its title I consider that we have a procedure with the following combined:

1. Reasonable suspicion regarding a *felony* or other public offense as more fully set out;

2. A palpation of the contours of the outer clothing[1] of the body held tightly against the body itself so as to reveal to the sense of

[1]In this case it is not necessary for us to decide whether a detainee can be asked to unfasten an overgarment such as a raincoat or overcoat.

touch any bulges which might signify the presence of hidden weapons;

3. And if the frisk gives such a clue an ordinary search within pockets or other parts of the clothing to seize the suspected object; and

4. Arrest if the friskee has a weapon contrary to law, e. g., a pistol concealed or without benefit of a permit.

5. If no weapon is found the detainee is due to be released and contraband found, if any, must be kept only for forfeiture and cannot be used in evidence.

APPENDIX "B"

August 1, 1972

STATE OF ALABAMA — JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

8th Div. 27

Paul Warren Bates

vs.

State of Alabama

Appeal from Madison Circuit Court

IT IS ORDERED that the application for rehearing be and the same is overruled.

APPENDIX "C"

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 8 Div. No. 504 Madison Circuit Court

Ex parte: Paul Warren Bates vs. _____
Appellant Appellee

Re: Paul Warren Bates v. State of Alabama

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

__/ Briefs filed
__/ Submitted on briefs
__/ Dismissed
__/ Application for rehearing and briefs filed
__/ Application for rehearing overruled
__/ Appell_____ granted 15 additional days to file briefs
__/ Transcript filed (Notice under Rule 12)
X/ Writ of Certiorari to Court of Criminal Appeals denied.

/s/ J. O. SENTELL
Clerk, Supreme Court of
Alabama

August 31, 1972

FILE COPY

Supreme Court, U. S.
FILED
JAN 11 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-775

PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. BAXLEY
Attorney General of Alabama

RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

Attorneys For Respondent

250 Administrative Building
Montgomery, Alabama 36104

IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

The question presented for review is adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT

This case arose out of the arrest and subsequent indictment by the Madison County, Alabama Grand Jury of Paul Warren Bates on a charge of possession of a pistol after having been convicted of a crime of violence. The Petitioner entered a plea of not guilty and the case was tried before a jury in the Madison County, Alabama Circuit Court which found the Petitioner guilty on March 19, 1969. The Petitioner was sentenced to be imprisoned in the state penitentiary for a period of three years as punishment.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered June 30, 1972. Petitioner filed an Application For Rehearing which was denied, without opinion, by the Court of Criminal Appeals of Alabama on August 1, 1972. Petitioner then filed a Petition For Writ of Certiorari which was denied, without opinion, by the Supreme Court of Alabama on August 31, 1972.

It was stipulated in the State trial court that the Petitioner had been convicted of second degree burglary and grand larceny on May 2, 1960. These are crimes of violence within the meaning of Title 14, Section 174, Code of Alabama 1940, Recompiled 1958. See Title 14, Section 172, Code of Alabama 1940, Recompiled 1958.

Huntsville Policeman Randall Tishner, the arresting officer, testified that on the night of December 5, 1968, while patrolling in a police car, he was dispatched to the Bella Vista Club in Huntsville. When he arrived, a man was standing in the parking lot of the Bella Vista Club. Officer Tishner asked the man if he was Paul Warren Bates, and when the man replied in the affirmative, the officer conducted a search by patting down the outside of Bates' clothing. Defense counsel objected to any testimony concerning the fruits of the search. Out of the presence of the jury the State made a showing by Officer Tishner that he received a call that Bates had a pistol and was at the Bella Vista Club. He further testified that he did not know Bates personally but that he had learned that in the process of a burglary in a grocery store in Huntsville Bates was involved in the incident during which a police officer was shot at. Regarding the manner in which the search was made, Officer Tishner further testified that after Bates identified himself, he had him put his hands against the outside wall of the club, patted the outside of his clothing and found a fully loaded pistol in his right front pant's pocket. Officer Tishner took the pistol from him and placed him under arrest.

This testimony was repeated in the presence of the jury and the pistol was introduced in evidence over the Petitioner's objection.

ARGUMENT

The Petitioner seeks to have this Honorable Court grant certiorari in this cause predicated upon his erroneous contention that the police conduct in seizing the pistol from his person and the pistol's subsequent introduction into evidence contravened the proscription of the Fourth Amend-

ment made obligatory upon the States via the Fourteenth Amendment.

This Honorable Court in its recent decision enunciated in *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed.2d 612, held that a policeman in making an investigatory stop based on an informer's tip, may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. The evidence in that case showed that a police sergeant was alone early in the morning on patrol duty in a high crime area of Bridgeport, Connecticut at approximately 2:15 A.M. when a person known to him approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The policeman approached the vehicle to investigate the informant's report, tapped on the car window, and asked the occupant to open the door. When the occupant rolled down the window instead of opening the door, the policeman reached into the car and removed a fully loaded revolver from the occupant's waistband. The gun had not been visible to the policeman from outside the car but was precisely in the place indicated by the informant. The occupant of the car was then arrested by the policeman for unlawful possession of the pistol. A search incident to the arrest was conducted following the arrival of other officers and disclosed substantial quantities of heroin on the occupant's person and in the car as well as a machete and a second revolver hidden in the automobile.

In rejecting the respondent's contention that the rationale of *Aquilar v. Texas*, 378 U.S. 108, 84 S. Ct. 509, 12 L. Ed.2d 723, was applicable to the informant's tip, this Court stated:

"In reaching this conclusion, we reject respondent's

argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situation — for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not thwart an appropriate police response."

This Court further stated that "the informant was known to him personally and had provided him with information in the past." It is noteworthy that the Court did not use the word, "reliable," in characterizing the information that the informant had previously supplied this police officer.

For a better understanding of the reliability of the informant in *Adams*, supra, the Respondent quotes from the dissenting opinion of Mr. Justice Marshall:

"The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station. The following colloquy took place between respondent's counsel and the officer at the hearing on respondent's motion to suppress the evidence that had been seized from him.

"Q. Now, with respect to the information that was given you about homosexuals in the Bridgeport Police Station [sic], did that lead to an arrest? A. No.

"Q. An arrest was made. A. No. There was no substantiating evidence.

"Q. There was no substantiating evidence? A. No.

"Q. And what do you mean by that? A. I didn't have occasion to witness these individuals committing any crime of any nature.

"Q. In other words, after this person gave you the information, you checked for corroboration before you made an arrest. Is that right? A. Well, I checked to determine the possibility of homosexual activity.

"Q. And since an arrest was made, I take it you didn't find any substantiating information. A. I'm sorry counselor, you say since an arrest was made.

"Q. Was not made. Since an arrest was not made, I presume you didn't find any substantiating information. A. No.

"Q. So that, you don't recall any other specific information given you about the commission of crimes by this informant? A. No.

"Q. And you still thought this person was reliable. A. Yes."

Hence, it is readily apparent that no substantial difference exists between the facts in *Adams*, supra, and those

in the case *sub judice*. In the present case Officer Tishner received a radio dispatch that the Petitioner was at a certain place armed with a pistol. Police officers had been shot at during the commission of a burglary in which the Petitioner was involved. With this knowledge it would certainly have been poor police work for Officer Tishner to have ignored this dispatch. When he arrived at the Bella Vista Club, he found the Petitioner present which tended to corroborate the information he had received. Considering what Officer Tishner knew, he had reason to believe that the Petitioner was armed and very possibly dangerous.

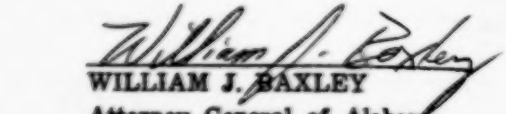
Accordingly, the Court of Criminal Appeals of Alabama is palpably correct in its conclusion that the radio dispatch, together with the knowledge possessed by Officer Tishner and his visual corroboration, justified the patting down of the Petitioner and the removal of his pistol, such action constituting reasonable police conduct within the meaning of the Fourth Amendment. For analogous cases upholding searches based upon anonymous tips coupled with visual corroboration see *Ballou v. Massachusetts*, 403 F.2d 982, cert. denied 394 U.S. 909, 89 S. Ct. 1024, 22 L. Ed.2d 222; *U. S. v. Walker*, D. C. App., 294 A.2d 376; *People v. Taggart*, 20 N.Y.2d 335, 229 N. E.2d 581; *People v. Jeffries*, 197 N. W.2d 903. See also *People v. Fenuta*, 332 N.Y.S.2d 92.

The pronouncements of this Court in *Adams*, supra, are manifestly controlling herein. The Petitioner's contentions to the contrary were correctly disposed of in the Alabama Court of Criminal Appeals and do not warrant consideration by this Court on certiorari.

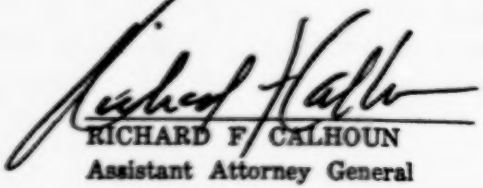
CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

Respectfully submitted,



WILLIAM J. BAXLEY
Attorney General of Alabama



RICHARD F. CALHOUN
Assistant Attorney General
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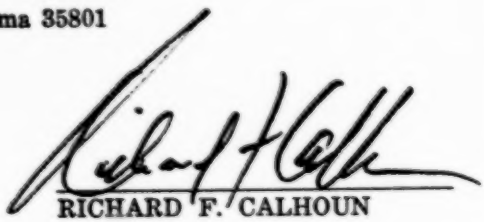
CERTIFICATE OF SERVICE

I, Richard F. Calhoun, one of the Attorneys For Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of JANUARY, 1973, I served copies of the foregoing Brief in Opposition of Respondent on Honorable Charles Curtis King, by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record, as follows:

Sullins and King
Attorneys at Law
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801



RICHARD F. CALHOUN

OF COUNSEL